

UT 97-5

Tax Type: USE TAX

Issue: Use Tax on Purchases, Fixed Assets Or Consumables

STATE OF ILLINOIS
DEPARTMENT OF REVENUE
OFFICE OF ADMINISTRATIVE HEARINGS
CHICAGO, ILLINOIS

DEPARTMENT OF REVENUE)	
STATE OF ILLINOIS)	
)	
v.)	NTL
)	
TAXPAYER)	Mimi Brin
)	Administrative Law Judge

RECOMMENDATION FOR DISPOSITION

Appearances: Mr. Gust Dickett, for TAXPAYER; Mr. Marc Muchin, Special Assistant Attorney General, for the Illinois Department of Revenue

Synopsis:

This matter comes on for hearing pursuant to TAXPAYER's (hereinafter referred to as "TAXPAYER" or the "Taxpayer") protest of Notice of Tax Liability XXXXX (hereinafter referred to as the "NTL"), issued by the Illinois Department of Revenue for Use tax and related taxes and penalties on the purchase of a boat in July, 1988. At issue is the question of whether TAXPAYER is the correct taxpayer liable for this transaction. Following the submission of all evidence and a review of the record following hearing, it is recommended that this matter be resolved in favor of the Department.¹

Findings of Fact:

1. The Department's *prima facie* case, inclusive of all jurisdictional elements, was established by the admission into evidence of the Correction of

¹. The hearing in this matter was conducted over two days, February 29, 1996 and May 2, 1996. Reference to the transcripts for each hearing day will be "Tr. 2/29" and "Tr. 5/2" respectively.

Returns, showing a liability for Use and related taxes and penalties. Department Ex. Nos. 1-4

2. Taxpayer signed a purchase agreement in March, 1987, with an Illinois retailer, RETAILER (hereinafter referred to as the "Retailer"), for the purchase of a Tayana V-42 Truck Cabin Aft/Cockpit Cutter boat (hereinafter referred to as the "Boat" or the "Hegira"²) (Department Ex. Nos. 6, 8) and simultaneously remitted a deposit for same of fifteen thousand three hundred seventy (\$15,370) dollars. Department Ex. Nos. 7, 8

3. In April, 1988, CORPORATION (hereinafter referred to as the "Corp") was incorporated under the laws of the State of North Carolina (Department Ex. No. 16) with SOLE DIRECTOR (hereinafter referred to as "SOLE DIRECTOR") as the sole director and incorporator.³ *Id.*

4. The corp made a twenty thousand (\$20,000) dollar payment on the boat on or about May 12, 1988 (Taxpayer Ex. No. 3) with a check signed by SOLE DIRECTOR and "XXXXX".

5. There is no evidence of record as to what entity paid the balance of the amount due for the boat.

6. No lien was ever recorded or any other evidence of record establishing that TAXPAYER's deposit money was a loan to the corp or that this money was ever repaid to TAXPAYER.

². Taxpayer's counsel spelled the name of the boat during the hearing. Tr. 5/2 p. 46 The name of the boat also appears as "Hejira" on a number of documents in the record. Department Ex. Nos. 25-32 For purposes of this recommendation, when the boat is referenced by name, the "Hegira" spelling will be used.

³. SOLE DIRECTOR was called by the Department as a witness at the May 2 hearing. At the onset of his testimony, taxpayer objected to his testimony invoking the attorney-client privilege. Tr. 5/2 p. 32 The Administrative Law Judge hearing the matter sustained the objection based upon SOLE DIRECTOR's testimony that TAXPAYER sought and asked for his professional opinion involving the boat at issue. Tr. 5/2 pp. 42, 44 SOLE DIRECTOR was excused as a witness thereafter, and was not asked any questions regarding his own involvement with the corp, as evidenced by Department Ex. Nos. 15 (SOLE DIRECTOR's letter to Department denying, *inter alia*, any involvement with the corp other than as attorney), 16 (corp Articles of Incorporation showing SOLE DIRECTOR as the sole director and incorporator), 20 (SOLE DIRECTOR's signature, as corp Vice President and Secretary, on an Affidavit of Out of State Delivery releasing retailer from ROT liability), Taxpayer Ex. 3 (corp check to retailer for \$20,000 for boat signed by SOLE DIRECTOR as vice president of corp)

7. Delivery of the boat was made in Maryland sometime at the end of May or the first of June, 1988, pursuant to the direction of the corp through its vice president and secretary, SOLE DIRECTOR. Department Ex. No. 20; Tr. 5/2 pp. 11-12 It came into Illinois shortly thereafter. Tr. 5/2 p. 12

8. TAXPAYER had also arranged with the retailer for delivery of the boat into Maryland. Department Ex. Nos. 6, 8

9. TAXPAYER was the person with whom the retailer corresponded regarding the boat prior to and subsequent to final payment, concerning, *inter alia*, any additions and corrections to the boat. Department Ex. Nos. 6, 8, 9, 10, 11, 12, 13, 14; Tr. 5/2 pp. 12, 13-14, 14-15

10. TAXPAYER inspected the boat after it arrived in Illinois from Maryland. Tr. 5/2 p. 15

11. The boat was registered with the Department of Transportation in June, 1991 with the retailer as the grantor and the corp as the grantee. Department Ex. No. 5

12. In April, 1988, TAXPAYER paid a fee to the Chicago Park District for a berth for the boat (Department Ex. No. 25) signing the Park District form as the boat owner. *Id.* See also, correspondence from TAXPAYER to Park District, dated January, 1988, indicating TAXPAYER as boat owner. Department Ex. No. 19

13. In February, 1989, TAXPAYER paid a fee to the Chicago Park District for a berth for the boat (Department Ex. No. 26) signing the Park District form as the boat lessee. *Id.*

14. TAXPAYER did not lease the boat from the corp. Tr. 5/2 pp. 55-56

15. In February, 1990, TAXPAYER paid a fee to the Chicago Park District for a berth for the boat (Department Ex. No. 27) signing the Park District form as the boat owner. *Id.*

16. TAXPAYER paid a fee to the Chicago Park District for a berth for the boat for the years 1991, 1992, 1993, 1995 signing the pertinent Park District forms as the boat owner. Department Ex. Nos. 28, 29, 30, 32

17. On May 14, 1992, documentation was filed with the Department of Transportation showing that in July, 1991, the corp deeded title to the boat to Cord Dudley. Department Ex. No. 5

18. On May 14, 1992, documentation was filed with the Department of Transportation showing that in February, 1992, Dudley deeded title to the boat to TAXPAYER. Department Ex. No. 5

19. No Use Tax return was filed for the 1988 purchase of the boat. Department Ex. Nos. 1-4

Conclusions of Law:

The Use Tax Act (Ill. Rev. Stat. ch. 120, par. 439.1 *et seq.*⁴) (hereinafter the "Act") provided for a tax "imposed upon the privilege of using in this State tangible personal property" purchased from a retailer. *Id.* at 439.3 "Use" is defined, in pertinent part, as "the exercise by any person of any right or power over tangible personal property incident to the ownership of that property... ." *Id.* at 439.2

There is no question that the boat, as tangible personal property, was purchased from a retailer located in Illinois, with the contracts entered into in Illinois, with delivery of the boat in Maryland, but arriving in Illinois within a month of that delivery. There is also no question that Use tax was not paid to the retailer on this purchase, nor that a Use tax return was not filed with Illinois at that time. The question which is to be answered herein is whether TAXPAYER exercised any right or power, incident to ownership, over the boat, which would subject him to liability under the Act.

TAXPAYER did not assume title to the boat in July, 1988 - the corp did. TAXPAYER, however, paid for the boat, in part. The documentary evidence of record is that the corp paid \$20,000 toward the boat purchase. Although TAXPAYER

⁴. The Use Tax Act in 1988 was found at Ill. Rev. Stat. ch. 120, par. 439.1 *et seq.* It is currently cited at 35 **ILCS** 105/1 *et seq.* Because the liability arose in 1988, the governing provision is that of the **Ill. Rev. Stat.**

testified that the corp paid the remaining balance, there is no documentation provided as proof.⁵ Tr. pp, 37, 39

Nor is there any evidence of record which supports an averment that TAXPAYER's deposit money transformed into a loan to the corp. Clearly, and admittedly, TAXPAYER recorded no lien against the boat, nor provided any documentation that the corp repaid him the deposit money at any time.

As cited above, the "use" of tangible personal property which triggers liability under the Act is the exercise of right or power over the property incident to its ownership. "Incident" is defined as "likely to happen as a result or concomitant"... . Webster's New World Dictionary (Second College Edition, 1982) From the time that TAXPAYER made the deposit on his purchase, he, and not the corp communicated with the retailer regarding all aspects of ownership of the boat. From the time that TAXPAYER made the deposit on his purchase, the retailer communicated with TAXPAYER, and not the corp, regarding all aspects of the ownership of the boat. Department Ex. Nos. 6 (Purchase Agreement, providing *inter alia*, for delivery of boat to Maryland, and for specifications for boat); 8, 9 (retailer advising of additional cost and forwarding to TAXPAYER a service manual with bill); 10 (TAXPAYER directing additions, corrections); 12 (TAXPAYER's status report to retailer on "open items"); 13 (status report from retailer to TAXPAYER including outstanding purchases not yet billed); 14 (four months after purchase completed, letter from TAXPAYER to retailer regarding corrections, replacements, warranty items, and request for samples of anchor chain "so I can obtain chain" and "use of chemical to 'anodize' staysail traveler track holes and proper size drill bit"); 19, 25-32

⁵. Taxpayer's Ex. No. 9, the retailer's 1995 affidavit stating that he sold the boat to the corp, which took over the purchase contract from TAXPAYER, addresses more the issue of what entity assumed title. When asked if the corp bought the boat, the retailer answered "David [TAXPAYER] told me they bought the boat." Tr. 5/2 p. 21 When asked if they [corp] paid for the boat, he responded "[n]ot that I am aware of." Id. at 22 This last answer is not inconsistent with the premise that although an entity may take title to property, that entity may not have paid for it, as, for example, a car for which a person has title but which is financed through another entity that records a lien.

(request by TAXPAYER for change to another mooring for this boat and evidence of yearly payments by TAXPAYER for mooring to Chicago Park District for the boat); Tr. 5/2 pp. 14-15 (after TAXPAYER advised retailer he wanted to ship boat from Maryland to Illinois, retailer gave TAXPAYER some shippers' names and addresses; after boat arrived in Illinois, TAXPAYER inspected boat and contacted retailer with respect to that inspection)

TAXPAYER admits that he did not have a lesser interest in the boat such as a lease right. And, since there is no evidence that the corp directed that TAXPAYER exercise the power over the boat⁶ that he did before, at the time of and after the purchase was completed, it is reasonable to assume from all of TAXPAYER's actions during these times, that TAXPAYER had an ownership interest in the boat at the very least commensurate with his \$15,000 payment toward purchase.

There is nothing in the statute which provides that Use tax liability can rest with only one entity. Thus, since TAXPAYER had an ownership interest in the boat and "used" it as provided for by statute, Use tax liability is appropriately placed with him.

Wherefore, for the reasons stated above, it is my recommendation that the Notice of Tax Liability be finalized as issued.

8/12/97

Mimi Brin
Administrative Law Judge

⁶. No one appeared on behalf of the corp to testify at hearing. As noted in this recommendation, SOLE DIRECTOR's signature appears, variously, as vice president and secretary of the corp, however, he was excused as a witness following TAXPAYER's motion invoking attorney-client privilege. Neither party called him to testify as to his role within the corp.